IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of GERALD WHITE, III, Petitioner.	No. 38025-1-II UNPUBLISHED OPINION

Van Deren, C.J.—Gerald White seeks to withdraw his guilty plea to a 1990 offense used as predicate offense for his current 1996 life sentence under the Persistent Offender Accountability Act (POAA). He claims that his plea was involuntary because the court and parties incorrectly calculated his offender score along with his proper range of punishment. The State argues that (1) White is not under restraint for his 1990 offense, (2) his petition is untimely, (3) his judgment and sentence is not facially invalid, and (4) his plea was voluntary. Because White was not informed about the one year statutory bar on collateral attacks, his petition, although filed 18 years after his conviction, is timely. We cannot decide, however, whether his plea was involuntary because that requires factual determinations. Consequently, we transfer this petition to the superior court for a decision on the merits under RAP 16.12.

FACTS

On January 17, 1990, White pleaded guilty to one count of second degree robbery. His plea statement listed an offender score of two points based on a prior robbery and a standard range sentence of 12-14 months' incarceration. In his plea and colloquy, White admitted taking a motorcycle with the threatened use of force (White had a paper bag over his hand so that his victim would think that he had a firearm). Defense counsel agreed with White's offender score calculation and the State explained that White's prior offense counted as two points because his prior robbery was a serious violent class A felony.

The judgment and sentence listed only a 1976 second degree robbery in White's criminal history. It did not specify the maximum sentence the court could impose nor did it or White's plea statement indicate that his conviction, because it involved a motor vehicle, would result in an automatic license suspension. Finally, neither the judgment and sentence nor the sentencing court's colloquy with White explained the time limitation for a collateral attack, RCW 10.73.090, or its exceptions, RCW 10.73.100.

In 1996, a jury found White guilty of first degree robbery while armed with a deadly weapon and first degree unlawful possession of a firearm. Relying on White's two prior robberies, the court imposed a life sentence under the POAA. We affirmed White's convictions. *See* Ruling Affirming J., *In re Pers. Restraint of White*, No. 21288-9-II (Wash. Ct. App. June 1, 1998).

On April 17, 2002, we dismissed a personal restraint petition in which White sought to challenge his POAA sentence. We held that the petition was untimely under RCW 10.73.090. *See* Order Dismissing Pet., *In re Pers. Restraint of White*, No. 28422-7-II (Wash. Ct. App. Apr.

17, 2002).

In December 2004, we dismissed another personal restraint petition in which White asserted that "(1) the State [had] failed to prove his 1971 robbery [conviction,] (2) he suffered ineffective assistance because (a) counsel failed to move for dismissal of his unlawful possession of a firearm conviction [for lack of evidence] and (b) counsel failed to challenge his [erroneous] criminal history[,] and (3) the State failed to prove the comparability of his 1971 conviction as former RCW 9.94A.120 (1996) required." We dismissed the petition as untimely and successive under RCW 10.73.090 and 10.73.140. *See* Order Dismissing Pet., *In re Pers. Restraint of White*, No. 32033-9-II, at 2 (Wash. Ct. App. Dec. 6, 2004).

ANALYSIS

I. Unlawful Restraint

RAP 16.4(a)[1] provides that a petitioner may seek relief from "restraint" that is "unlawful." "A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under *some other disability resulting from a judgment or sentence in a criminal case.*" RAP 16.4(b) (emphasis added)

[1]RAP 16.4(a) provides, "**Generally**. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c)."

RAP 16.4(c)[2] defines "unlawful nature of restraint."

White contends that he is under restraint from his 1990 conviction because (1) this 1990 offense is serving as a predicate offense for his current life sentence and (2) he still owes $13,051 in legal financial obligations for his 1990 conviction. The State argues that White is not under restraint for his 1990 offense but rather for his continuing criminal activity.

The State is wrong. As our Supreme Court explained in *In re Pers. Restraint of Davis*:

> Davis is no longer incarcerated or under state supervision. The State filed a motion with this Court to dismiss Davis' personal restraint petition on this ground. The motion was denied. As this Court has noted, a "separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." *State v. Calle,* 125 Wn.2d 769, 773, 888 P.2d 155 (1995) (quoting *Ball v. United States,* 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed.

[2] RAP 16.4(c) provides:

> **Unlawful Nature of Restraint**. The restraint must be unlawful for one or more of the following reasons:
>
> (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or
>
> (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
>
> (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or
>
> (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or
>
> (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or
>
> (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
>
> (7) Other grounds exist to challenge the legality of the restraint of petitioner.

> 2d 740 (1985) (emphasis omitted)). "For example, the presence of two convictions on the record may . . . result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction . . . certainly carries the societal stigma accompanying any criminal conviction." *Id.*

142 Wn.2d 165, 170 n.2, 12 P.3d 603 (2000). "[A]n unlawful conviction can serve as a restraint on liberty due to collateral consequences" such as the effect on one found to be a habitual offender. *In re Pers. Restraint of Powell*, 92 Wn.2d 882, 887, 602 P.2d 711 (1979). In *Born v. Thompson*, the petitioner demonstrated sufficient restraint to seek habeas relief by showing that prior commitment required a finding that he committed a violent act; thereby reducing the burden of proof in any future proceeding. 154 Wn.2d 749, 764-65, 117 P.3d 1098 (2005). White is under restraint and may seek relief from unlawful confinement.

II. Notice of Time Bar

RCW 10.73.090 limits the time to one year from finality within which someone under restraint may collaterally challenge their conviction.[3] White contends that none of the sentencing documents nor the court's colloquy at sentencing informed him of either this limitation or the six exceptions set out in RCW 10.73.100, in violation of RCW 10.73.110.[4]

The State does not challenge White's assertion that he received no notice but instead, without authority on point, argues that giving White an unending right to challenge his conviction undermines the principles of finality. "[C]ollateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish

[3] RCW 10.73.090(1) states, "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."

[4] RCW 10.73.110 provides, "At the time judgment and sentence is pronounced in a criminal case, the court shall advise the defendant of the time limit specified in RCW 10.73.090 and 10.73.100."

admitted offenders. These are significant costs which require that collateral relief be limited." *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 86, 660 P.2d 263 (1983).

In *In re Pers. Restraint of Vega*, the petitioner was incarcerated in a federal institution when RCW 10.73.090 became law. 118 Wn.2d 449, 450, 823 P.2d 111 (1992). RCW 10.73.120 required the Department of Corrections (DOC) to notify all persons that were incarcerated and those on probation, parole, or community supervision of the newly adopted one year time limit on a petition on collateral attack. DOC failed to notify Vega. *Vega*, 118 Wn.2d at 450. The Court held that the lack of notice required that the court treat Vega's petition as timely, noting, "Had there been actual notification or even attempted notification, the petition would have been properly denied." *Vega*, 118 Wn.2d at 451.

In *State v. Schwab,* 141 Wn. App. 85, 92, 167 P.3d 1225 (2007), *review denied,* 164 Wn.2d 1009 (2008), we allowed an otherwise untimely petition,[5] reasoning, "There is no evidence in our record showing that the trial court or DOC notified Schwab that he had only one year to collaterally attack the judgment. Thus, Schwab did not receive the notice that RCW 10.73.110 and .120 require and his CrR 7.8 motion must be deemed timely."

Similarly, here, the record contains no evidence showing that White initially had notice of the time limit for collateral attack. His judgment and sentence does not contain the notice and the sentencing court did not inform White when it imposed sentence. Further, the State does not contend otherwise.

White's 1996 judgment and sentence notified him of the time limit for challenge to his

[5] Schwab's judgment was final on May 4, 2004, and he filed his CrR 7.8 motion on July 29, 2005. *Schwab,* 141 Wn. App. at 91.

1996 conviction and we reiterated that rule when we denied White's personal restraint petition in 2002. In our order dismissing that petition, we explained:

> This petition is time-barred because it was filed more than one year after his judgment and sentence became final. *See* RCW 10.73.090(1) (one-year limit). White's convictions became final on September 23, 1998 when this court issued the mandate disposing of his appeal. *See* RCW 10.73.090(3). Thus, this petition, filed on April 24, 2001, is untimely; review is barred unless the petition is based on one or more of the exceptions listed in RCW 10.73.100.

Order Dismissing Pet., *White* No. 28422-7-II at 1-2 (footnot omitted). But White has never had notice that RCW 10.73.090 applies to his 1990 offense and we are unwilling to say that notice six years later in a different proceeding provided constructive notice. The time bar does not apply to White's 1990 offense absent proof of actual notice.

III. Facial Invalidity

Because we find that White's petition is timely, we need not address his claim that his 1990 judgment and sentence is facially invalid. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002) (time limit in RCW 10.73.090 only applies to a valid judgment and sentence).

IV. Voluntariness of the Plea

White claims that his 1990 plea was involuntary because the court and the parties incorrectly calculated his offender score and consequently miscalculated his standard range sentence. He concedes that the court should have used an offender score of five, rather than two, and that he understands that he will receive a longer sentence when he is resentenced.

The criminal history listed on White's 1990 judgment and sentence shows only a 1976 second degree robbery conviction. Crossed off without explanation is a 1974 burglary conviction.

Yet, according to a 1996 DOC presentence investigation, White had a 1970 first degree forgery conviction, a 1971 robbery conviction, and 1974 and 1976 second degree burglary convictions. If this is correct, the 1990 judgment and sentence has incorrect conviction data.

> [A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea.

State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). White makes a prima facie showing that the 1990 sentencing court used an incorrect offender score in calculating his potential punishment. The trial court must determine whether White carries his burden to show that his offender score was wrong. If so, the trial court must allow him to withdraw his guilty plea.[6]

Nonetheless, the State argues that White is not entitled to withdraw his plea because he agreed to the criminal history and sentencing calculation. It relies on the following colloquy from the 1990 sentencing hearing:

> [STATE]: The defendant's criminal history consists of one conviction that counts, and he was sentenced on 4-13-76, and that was a conviction for Robbery in the First Degree. That is an over ten-year-old conviction, but it would not wash as it is a Class A felony.
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> Since it is a Robbery under the Sentencing Guidelines, Robbery would be a serious violent offense. When you take that one conviction, it is times two, and that gives him a total offender score of 2, and that would give him a standard range of 12-plus to 14 months. I believe that would be Robbery in the Second Degree as the current offense, so that would give him the standard range of 12-plus to 14 months.
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> [DEFENSE COUNSEL]: That's correct, Your Honor.

Br. of Petitioner, App. D at 5-6.

[6] In addition to considering evidence of the convictions in White's criminal history in 1990, the trial court will need to determine which, if any, wash out provisions affected White's offender score calculation.

In *State v. Mendoza*, 165 Wn.2d. 913, 205 P.3d 113 (2009), the Court held that a defendant must affirmatively acknowledge his criminal history before the State is relieved of its duty to prove criminal history by a preponderance of the evidence; mere acquiescence is insufficient. In our view, White did not acknowledge his criminal history or scoring. *But see State v. Bergstrom,* 162 Wn.2d 87, 94, 169 P.3d 816 (2007), ruling that the defendant waives the right to challenge his criminal history if he affirmatively agrees with State's recitation and makes no specific objections.

We hold that RCW 10.73.090 does not apply, that White has the right to raise his claim of an involuntary plea, that he has made a prima facie showing of involuntariness, and that the trial court is the appropriate court to take evidence regarding petitioner's criminal history and decide whether there was sentencing error and whether White should be allowed to withdraw his 1990 guilty plea. We transfer this petition to the superior court for a decision on the merits under RAP 16.12.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

I concur:

Bridgewater, J.

Penoyar, J. (dissent) — I join in the majority until it concludes that White did not receive sufficient notice of the one year time bar for personal restraint petitions by receiving notice of RCW 10.73.090 during both his 1996 sentencing and in our 2002 order dismissing his collateral attack on that conviction as untimely. In that order, we informed White:

> This petition is time-barred because it was filed more than one year after his judgment and sentence became final. *See* RCW 10.73.090(1) (one-year limit).[7] White's convictions became final on September 23, 1998 when this court issued the mandate disposing of his appeal. *See* RCW 10.73.090(3). Thus, this petition, filed on April 24, 2001, is untimely; review is barred unless the petition is based on one or more of the exceptions listed in RCW 10.73.100. [None of which apply.]

Order Dismissing Petition, No. 28422-7-II (filed April 17, 2002).

White's 1996 judgment and sentence clearly provided:

> **5.1 COLLATERAL ATTACK ON JUDGMENT**: Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

This same page contains White's signature. *Judgment & Sentence,* at 8 (Thurston County Cause No. 96-1-00633-9).

The majority concludes that these notices do not cure the trial court's failure to inform White about the time bar as the law required at his 1990 sentencing hearing. In my view, this court's description of the time bar in our 2002 order is quite clear and complete. White could not be mistaken because of it. Further, White's 1996 judgment and sentence provided explicit notice, defined collateral attacks, and directed White to the statutory authority for the time limitation.

[7] RCW 10.73.090(1) states: "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."

This, combined with the notice this court provided in 2002, was more than adequate to give White notice or, at the very least, cause him to seek clarification sooner than 6 years after our order and 12 years after his 1996 conviction.

I disagree with the majority on this issue, would find this petition time barred, and would deny the petition because White shows no applicable exception to this time bar or that his 1990 judgment and sentence is facially invalid.

Penoyar, J.